

<sup>2</sup> The Board notes that, following the July 1, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$580.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On January 9, 2007 appellant, then a 55-year-old office automation assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained major depressive disorder and generalized anxiety disorder causally related to factors of her federal employment. OWCP accepted the claim for generalized anxiety disorder and a single episode of major depression, in full remission. It paid appellant wage-loss compensation on the supplemental rolls, effective February 3, 2004, and on the periodic rolls, effective August 29, 2010.

On September 4, 2020 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA for completion.

In a response dated September 19, 2020, SSA provided appellant's SSA age-related retirement benefit rates with FERS and without FERS from May 2013 through December 2019. It indicated that, beginning May 2013, appellant's SSA rate with FERS was \$864.20 and without FERS was \$402.50; effective December 2013, her SSA rate with FERS was \$877.10 and without FERS was \$408.60; effective December 2014 and 2015, her SSA rate with FERS was \$892.00 and without FERS was \$415.50; effective December 2016, her SSA rate with FERS was \$894.60 and without FERS was \$416.70; effective December 2017, her SSA rate with FERS was \$912.40 and without FERS was \$425.00; effective December 2018, her SSA rate with FERS was \$937.90 and without FERS was \$436.80; and effective December 2019, her SSA rate with FERS was \$952.90 and without FERS was \$443.80. SSA indicated that appellant's SSA disability benefits ended in April 2013 and that her SSA age-related retirement benefits began in May 2013.

OWCP completed a FERS offset overpayment calculation form on February 23, 2021. It calculated the amount that it should have offset from appellant's wage-loss compensation for each period from May 1, 2013 through October 10, 2020. OWCP found that from May 1 through November 30, 2013, appellant received an overpayment of \$3,257.27; from December 1, 2013 through November 30, 2014, she received an overpayment of \$5,637.4; from December 1, 2014 through November 30, 2015, she received an overpayment of \$5,733.71; from December 1, 2015 through November 30, 2016, she received an overpayment of \$5,749.42; from December 1, 2016 through November 30, 2017, she received an overpayment of \$5,750.55; from December 1, 2017 through November 30, 2018, she received an overpayment of \$5,864.87; from December 1, 2018 through November 30, 2019, she received an overpayment of \$6,029.72; and from December 1, 2019 through October 10, 2020, she received an overpayment of \$5,285.77. Based on these figures, it calculated the total overpayment amount of \$43,308.75.

In a preliminary overpayment determination dated February 23, 2021, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the amount of \$43,308.75 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised her that she could request waiver of

recovery of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records supporting income and expenses. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On March 17, 2021 appellant requested waiver of recovery of the overpayment and asserted that it would be a financial hardship for her to repay the overpayment. In an OWCP-20 form dated March 17, 2021, she listed monthly income of \$3,133.95 consisting of Supplemental Security Income and wage-loss compensation from OWCP. Appellant indicated that she had monthly expenses totaling \$3,584.62. She advised that she paid \$1,180.54 for her rent or mortgage including property taxes and home insurance, \$125.00 for food, \$246.00 for utilities, and \$160.27 for other expenses. Appellant indicated that she had monthly expenses of \$633.08 for an automobile loan, \$344.70 for a consolidated loan, \$545.04 for a lending club loan, and \$350.00 for credit card debt. She listed assets of \$49.24.

Appellant submitted bank statements showing that she paid \$782.34 for her mortgage, \$545.04 to a lending club, \$633.08 for an automobile loan, and \$344.70 for a bill consolidation loan. Credit card statements showed a total of \$215.00 in monthly minimum payments. Appellant further submitted documentation showing that she paid \$471.00 yearly for mortgage insurance, \$499.53 in property taxes, \$593.50 every six months for car insurance, and \$211.25 monthly for telephone, internet, and cable. She submitted checks showing payments of \$144.20 to a housing assistance corporation, \$60.00 for a storm water payment, \$48.17 for utilities, and \$254.00 for a condominium fee.

By decision dated July 1, 2021, OWCP finalized its finding that appellant had received an overpayment of compensation in the amount of \$43,308.75 for the period May 1, 2013 through October 10, 2020 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It denied waiver of recovery of the overpayment. OWCP found that appellant paid more than the required minimum on credit cards and that her mortgage payment was \$782.00 rather than \$1,100.00. It also noted that appellant had received monthly deposits of \$360.00, \$280.00, and \$272.00. OWCP required recovery of the overpayment by deducting \$580.00 from her continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>3</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup>

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> 5 U.S.C. § 8102.

<sup>5</sup> *Id.* at § 8116.

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.<sup>6</sup> FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$43,308.75 for the period May 1, 2013 through October 10, 2020 for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset.

OWCP paid appellant wage-loss compensation for total disability beginning February 3, 2004. Appellant received SSA age-related retirement benefits beginning May 1, 2013. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.<sup>8</sup> The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. Accordingly, the Board finds that fact of overpayment has been established.<sup>9</sup>

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided appellant's SSA age-related retirement benefit rates with FERS and without FERS from May 2013 through December 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment of compensation in the amount of \$43,308.75. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period May 1, 2013 through October 10, 2020 and finds that an overpayment of compensation in the amount of \$43,308.75 was created.<sup>10</sup>

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<sup>6</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *Supra* note 7. *See F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>9</sup> *See L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

<sup>10</sup> *See N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>11</sup>

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>12</sup> An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>13</sup> Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.<sup>14</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.<sup>15</sup>

Recovery of an overpayment is against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>16</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that this case is not in posture for decision regarding whether OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>17</sup>

In a March 17, 2021 overpayment recovery questionnaire, appellant advised that she had assets of \$49.24, monthly income of \$3,133.95, and monthly expenses of \$3,584.62. She provided

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<sup>11</sup> 5 U.S.C. § 8129.

<sup>12</sup> 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a.(2) (September 2020).

<sup>13</sup> *Id.* at Chapter 6.400.4a.(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

<sup>14</sup> *See supra* note 12 at Chapter 6.400.4a.(2).

<sup>15</sup> *Id.* at Chapter 6.400.4b.(3).

<sup>16</sup> 20 C.F.R. § 10.437(a)-(b).

<sup>17</sup> *Id.* at § 10.436.

bank statements, bills, and checks supporting that her monthly expenses exceeded her monthly income.

OWCP denied waiver of recovery as it found that appellant had unexplained monthly deposits and that her mortgage payment was \$782.00 rather than \$1,100.00. However, appellant noted that she was including property taxes and insurance in the payment. OWCP also found that she paid more than the minimum expenses on credit cards. It did not, however, calculate appellant's monthly expenses or explain in detail how her monthly income exceeded monthly expenses by more than the resource base. OWCP's decision provides insufficient discussion or analysis regarding whether waiver would be against equity and good conscience or defeat the purpose of FECA.<sup>18</sup> The determination of whether OWCP shall waive recovery of an overpayment is a matter that rests in its discretion pursuant to regulatory guidelines. The Board will not substitute its own discretion to decide the matter.<sup>19</sup>

The case will be remanded to OWCP to obtain updated financial information from appellant. After such development as it deems necessary, OWCP should issue a *de novo* decision on the issue of waiver of recovery of the overpayment.<sup>20</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$43,308.75 for the period May 1, 2013 through October 10, 2020 for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that the case is not in posture for decision regarding whether OWCP properly denied waiver of recovery of the overpayment.

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<sup>18</sup> See *R.W.*, Docket No. 14-0195 (issued October 10, 2014).

<sup>19</sup> See *R.W.*, Docket No. 17-0276 (issued August 8, 2017); *John M. Dunn*, Docket No. 92-2096 (issued February 18, 1994).

<sup>20</sup> In view of the Board's disposition of Issue 1, Issue 2 is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 9, 2022  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board